

# **DUI SEMINAR**

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APAAC Training Center  
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## **MOTION PRACTICE HIGHLIGHTS**

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## Motion Practice Highlight

DUI: BAC & Beyond

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## APAAC on Demand Presentations

- Basic Motion Practice
  - Rules (pre & post trial)
  - Substantive issues – Rule 8, voluntariness, *Miranda*, right to counsel
  - Suggestions for evidentiary hearing
- Corpus Delicti Rule
  - The Standard
  - Motions in limine
  - Hearsay
  - DUI
- Search & Seizure for Traffic Cases
- Discovery
  - Overview
  - Responding to defense motions to compel & for sanctions
  - The standard

## General Reminders

### Know & Use the Rules & the Comments

- ✓ Rule 15.7(b)
  - No sanctions hearing w/o good faith certificate
- ✓ Rule 15.2(a)(8)
  - Def. shall at any time submit to reasonable physical exam (HGN)
- ✓ Rule 32
  - ✓ Time limits & preclusion
  - ✓ Summary disposition – 32.6(c)
- ✓ Rules 16.1 & 16.2
- ✓ Rule 35.1
- ✓ Rules specific to your issue



## RULES OF ENGAGEMENT

On questions of admissibility, the Court "is not bound by the Rules of Evidence, except those with respect to privileges"

*Rule 104(a) Rules of Evid.*

Hearsay is admissible in MOST motion hearings

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## Be Proactive

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### Motions *in limine* – Examples

- Absent Expert (criminalist)
  - *Rogovich; State v. Karp (Voris, RPI)* 236 Ariz. 120 (App. 2013)
- Prescription Drug Cases
  - Hearsay
  - Relevance/preclude
  - 28-1381(D) – correct doctor (remember formal discovery)
- Micro Clots
- *Corpus Delicti*
- Preclude Intent Arguments
  - APC & Marijuana cases
  - Ambien – sleep driving

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### Motions *in limine* - Examples

- *Guthrie/Cooperman*
  - 2100/1, RFI, breathing pattern, temp, source code, etc.
- Medical Marijuana – create new ones
- Use of Fermentation in Cadavers Studies
- Preclude self-serving hearsay
- Be pro-active!

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**Keen**

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## Second Sample - *KEEN*

If defendant :

- 1) requests & obtains a sample for his/her own use &/or
- 2) attacks validity of State's test

State may:

- cross-examination about receiving second sample, &
- comment on defendant's failure to produce evidence of second sample results at trial (reasonable inference against them).

*State ex rel. McDougall v. Corcoran (Keen, RPI), 153 Ariz. 157 (1987).*

If they test and notice an expert, file motion for disclosure.

## *Keen*

- Make sure there is enough blood left for testing before making this argument

Remember – Proceed with Caution!

Use a Motion *in limine*

## Responding to Defense Motions

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## Don't Automatically Buy Into Defense Arguments

- Evaluate With a Critical Eye
- Examples of Erroneous Def. arguments:
  - Rule 702 applies to FSTs, all of the DRE examination, NHTSA cues, etc.
  - State has to collect sample of blood for defendant
  - Uncertainty budget affects admissibility
  - "Due diligence" applies to Rule 8
  - Rule 8 violations result in dismissal with prejudice

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## Reminder

### Ask – Does 4<sup>th</sup> Amendment Apply?

- 1) Did defendant have an expectation of privacy?
- 2) Was there a search or seizure?
- 3) Was there State action?

If so – was it reasonable, is there a warrant exception?

Remedy is suppression – not dismissal

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## 4th Amendment Reminders

- Exclusionary Rule (suppression) is NOT automatic for a violation
  - *Herring v. US*, 555 U.S. 35 (2009).
  - If relying on overturned precedent - *Davis v. US*, 564 U.S. \_\_\_\_ (2011)
- Good Faith
- Inevitable discovery. *State v. Rogers*, 216 Ariz. 555 (App. 2007)
- Inventory search (include its police policy)
- Look for no stop - *Robles*
- AZ no tougher than feds except for home searches

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### A Swerve IS Enough to Stop

- *State v. Superior Court (Blake)* 149 Ariz. 269 (1986) (weaving within one's lane).
- Distinguish *State v. Livingston*, 206 Ariz. 145 (App. 2003).
  - one swerve
  - officer's training & experience
  - signs & symptoms of impairment
  - curvy vs. straight road
  - NHTSA cues

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### Motions to Suppress Breath/Blood Tests

- All State is required to do is lay basic foundation. Any remaining issues go to weight, not admissibility, of evidence.

*State v. Plew*, 155 Ariz. 44 (1987); *State v. Superior Court (Weant, RPI)*, 172 Ariz. 153 (App. 1992).

A.R.S. 28-1323(B)

Phlebotomist is qualified person is not foundational

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### Is It A Question of Fact?

- Did it or did it not happen?
- All questions of fact are for the jury
  - Gum in the defendant's mouth
  - Deprivation period issues




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## Battle of the Experts

- Disagreements between experts go to weight, not admissibility. *State v. Velasco*, (Alday, RPI), 165 Ariz. 480, 486 (1990).
- Where there is a lack of unanimity in scientific community on accuracy of breath test, "the scientific disagreement affects only the weight and not the admissibility of evidence." *State v. Olivas*, 77 Ariz. 118 (1954).

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## Battle of the Experts

- The determination of the credibility of witnesses is a question for the jury.
- *State v. King*, 213 Ariz. 632 (App. 2006)
- *State v. Rivera*, 116 Ariz. 449 (1977)
- Rule 702 comments

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## Deprivation Period

- "[A] failure to continuously observe a defendant for 20 minutes prior to the administration of the test goes to the weight to be accorded the results of the test." *State v. Corrales*, 135 Ariz. 105, 106 (App. 1982).
- Deprivation period is contained on the checklist. A.R.S. 28-1313(A)(4) specifically provides testimony of operator is sufficient to establish this requirement. *State v. King*, 213 Ariz. 632 (App. 2006).

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## Missing/Defective SQAPs

Only need periodic records.

*State v. Duber*, 187 Ariz. 425 (App. 1996); *State v. Superior Court (Stock, RPI)*, 181 Ariz. 201 (1995).

ARS § 28-1323(A)(5) – multiple ways to satisfy

- SQAPs
- Calibrations
- Bracketing calibrations on breath card
- [Testimony of Criminalist]




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## Independent Chemical Test

No requirement to advise defendant of this right, unless State chooses:

- 1) not to invoke implied consent law; and
- 2) not to conduct chemical test.

*Montano v. Superior Court*, 149 Ariz. 385 (1986);  
*Mack v. Cruikshank*, 196 Ariz. 541 (App. 1999).




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## What if I Lose?

Appeal, Special Action, Proceed Anyway?

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## Cannot Use the Constitution as a Shield & a Sword

*Harris v. New York*, 91 S.Ct. 643 (1971)  
*United States v. Havens*, 100 S.Ct. 1912 (1980)  
*State v. Menard*, 135 Ariz. 385 (App. 1983)  
*State v. Fortier*, 149 Vt. 599, 547 A.2d 1327 (1988)

**Suppressed evidence can be used to impeach.**

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## What If I Lose?

- **Ensure Record is Good**
  - On the record
  - Diagrams are admitted and labeled
  - Do **not** waive arguments for appeal
  - Make offers of proof
  - Don't just pick one argument
- **Get Judge to Give Basis for Ruling**
- **Motion to Reconsider**
- **Control the Standard of Review Through Stipulations**

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## Appeal or Special Action?

- Right to Appeal?
  - ARS § 13-4032
  - ARS § 13-4032(6) State may appeal orders granting motions to suppress
  - *State v. Roper*, 225 Ariz. 273 (App. 2010) & *State v. Bejarano*, 219 Ariz. 518 (App. 2008) (relied on *Lelevier* – mtn to suppress challenges only the constitutionality of obtaining evidence.)
  - But see, *State v. Rodriguez*, 126 Ariz. 38 (1980) & *State v. Rodriguez*, 160 Ariz. 381 (App. 1989)
- May Need to Take a Special Action

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